

No. 8875

IN THE

9

United States Circuit Court of Appeals

For the Ninth Circuit

MARY H. WILSON, WINFRED T. WILSON
and FRANCIS A. WILSON,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANTS.

JOSEPH C. MEYERSTEIN,

57 Post Street, San Francisco,

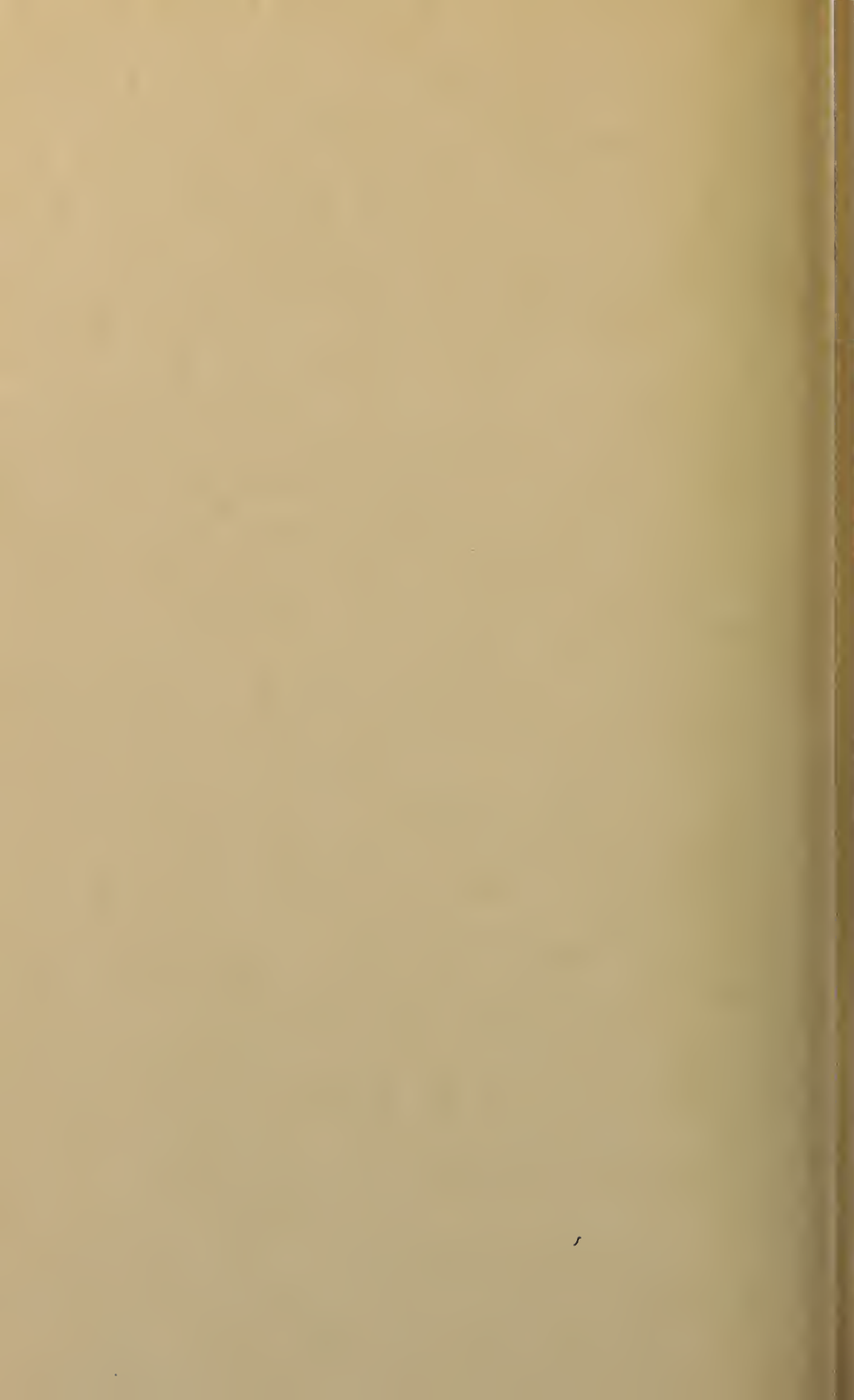
Attorney for Appellants.

FILED

AUG 17 1938

PAUL P. O'BRIEN,

CLERK



Subject Index

	Page
1. Statement of pleadings and facts disclosing jurisdiction	1
2. Statement of the case.....	3
3. Specification of assigned errors to be relied upon.....	8
4. Argument	8
a. Summary	8
b. No evidence to support finding transferor was insolvent	9
c. Burden of proof on appellee.....	15

Table of Authorities Cited

Cases	Page
Adams v. Nagle, 82 Law. Ed. U. S. Sup. Ct. Opinions 688..	7
Baker, In re, 30 BTA 188.....	17
Butler, In re, 24 BTA 536.....	17
Commissioner v. Keller, 59 Fed. (2d) 499.....	17
Delanoy v. Delanoy, 216 Cal. 23.....	14
Hulse v. Lawson, 212 Cal. 614.....	14
Kessler, In re, 217 Cal. 32.....	14
McDonald v. Williams, 174 U. S. 397.....	17
Siberell v. Siberell, 214 Cal. 32.....	14
Swan v. Walden, 176 Cal. 195.....	14
Tyler v. United States, 281 U. S. 496.....	14
United States v. American Bell Telephone Co., 159 U. S. 548, 40 L. Ed. 255.....	2
United States v. Bougher, Fed. Cases No. 14,627.....	2
United States v. Nathanson, 1932 CCH 9432, U. S. D. C. Northern Division of Ill.....	17
United States v. Northern Pacific R. R., 134 Fed. 715....	2
Warburton v. White, 176 U. S. 484.....	14

Statutes

U. S. C. A., Title 28, Sec. 41.....	2
U. S. C. A., Title 28, Sec. 223.....	2



No. 8875

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

MARY H. WILSON, WINFRED T. WILSON
and FRANCIS A. WILSON,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANTS.

**STATEMENT OF PLEADINGS AND FACTS DISCLOSING
JURISDICTION.**

In this suit, the United States of America (Appellee herein), as Plaintiff, filed its Bill of Complaint in the Southern Division of the United States District Court for the Northern District of California, against the Defendants, Mary H. Wilson, Francis A. Wilson and Winfred T. Wilson (Appellants herein), to recover from said Defendants deficiencies in income taxes for the years 1918 and 1919 as determined by the United States Board of Tax Appeals and assessed by the Commissioner of Internal Revenue against Henry Wilson, husband of Defendant, Mary H. Wilson, and father of Defendants, Francis A. Wilson and Win-

fred T. Wilson, on the ground that by a voluntary transfer to Defendants of all of his property shortly prior to his death, Henry Wilson rendered himself insolvent; and that, therefore, the transfer was in fraud of Plaintiff's rights; and the Defendants, having by reason of the transfer received an amount of money in excess of the taxes due from Henry Wilson, became liable therefor to Plaintiff as trustees. The unpaid taxes sought to be recovered from Defendants amount to \$4,006.61 for the year 1918, and \$1,725.39 for the year 1919, with accrued and accruing interest. The Defendants are and were at the time of the commencement of suit residents of the Southern Division of the Northern District of California.

1. The Federal District Courts have original jurisdiction in all cases where the United States is plaintiff or petitioner despite the amount in controversy.

U. S. C. A. Title 28 section 41;

United States v. Northern Pacific R. R., 134 Fed. 715;

United States v. Bougher, Fed. Cases No. 14,627.

2. The Circuit Courts of Appeals have appellate jurisdiction of all cases in which original jurisdiction is conferred on Federal Courts by reason of the United States being plaintiff or petitioner.

U. S. C. A. Title 28 section 223;

United States v. American Bell Telephone Co.,
159 U. S. 548, 16 S. Ct. 69; 40 L. Ed. 255.

3. Bill of Complaint. (Rec. p. 1.)

STATEMENT OF THE CASE.

The Bill of Complaint.

The allegations of the original bill are substantially as follows:

On March 12, 1919, Henry Wilson filed his income tax return for the calendar year 1918 and paid the tax as shown on the return.

On the 15th of March, 1920, Henry Wilson filed his income tax return for the calendar year 1919, and paid the tax as shown on the return.

On the 14th of February, 1924, and again on the 13th of January, 1925, Henry Wilson executed waivers extending the time for assessment of taxes for the years 1918 and 1919.

On September 4, 1925, the Commissioner of Internal Revenue notified Henry Wilson of additional tax deficiencies:

For the tax year 1918 in the sum of \$6,591.52;

For the tax year 1919 in the sum of \$2,596.80.

On October 26, 1925, Henry Wilson petitioned the Board of Tax Appeals for a review of the Commissioner's action in asserting said deficiencies, and on the 6th of November, 1928, after hearing, the Board fixed the deficiencies as follows:

	<u>1918</u>		<u>1919</u>
Tax	\$4,006.61	Tax	\$1,725.39
Interest	775.74	Interest	334.06
	<hr/>		<hr/>
Total	\$4,782.35	Total	\$2,059.45

The determination of the Board was followed by assessments pursuant thereto on the 18th of May, 1929.

(It will be noted that the Board of Tax Appeals fixed the deficiencies in an amount \$3,456.32 less than the amount demanded by the Commissioner of Internal Revenue.)

On the 1st of June, 1928, Henry Wilson voluntarily without consideration, transferred to the Defendants, Mary H. Wilson and Francis A. Wilson, jointly, all of the property then owned by him, including \$430,737.73 in the San Francisco Bank.

The transfer of this money left Henry Wilson insolvent and (to quote the exact language of the bill) "further operated as a fraud on this Plaintiff in that said transfer left the said Henry Wilson without property out of which the Plaintiff's said tax assessments could be collected".

Subsequent to the receipt by them of the money transferred, Mary H. Wilson and Francis A. Wilson, pretending to act in accordance with the request made by the said Henry Wilson in his lifetime, made a voluntary payment of \$67,681.92 to the Defendant, Winfred T. Wilson, out of the moneys transferred to them by Henry Wilson.

On June 5, 1928, Henry Wilson died, and other than the money transferred left no estate out of which Plaintiff's claim or any part thereof could be collected or paid.

The bill then alleges:

“The property so transferred to the Defendants by the said Henry Wilson, as hereinbefore alleged, was received by said Defendants and each of them impressed with a trust in equity for the benefit of the Plaintiff, the United States of America, and that said Defendants are jointly and severally liable to the Plaintiff for the taxes left owing and unpaid to Plaintiff, when said Henry Wilson so disposed of all of his property out of which Plaintiff or its agents or collectors could collect said taxes under ordinary available remedies.”

It will be observed that aside from the allegation that Henry Wilson disposed of *all* of his property and thereby left himself *no assets or property* out of which Plaintiff could collect the taxes assessed for the years 1918 and 1919, no facts whatever are alleged in the bill which would constitute actual fraud or which would indicate any other circumstances that would give rise to a claim on the part of the Plaintiff against Defendants for the payment of Henry Wilson's taxes.

The Evidence.

The uncontradicted evidence in the case is that at the time of the transfer as made by Henry Wilson to the Defendants, Henry Wilson was over 79 years old and had been for several weeks under the care of a physician and a nurse. He had previously been in good health and, so far as he himself was concerned, expected to live for some time. His physician

thought that he might live for some time. So far as he himself and his family were concerned, death was not regarded as imminent. The reason he gave for making the transfer was because half of the money belonged to the Defendant, Mary H. Wilson, as community property, and she had started out without anything and had worked hard and saved for many years and it was her money. And as to the balance, he wanted to give it to the Defendants, Mary H. Wilson, Winfred T. Wilson and Francis A. Wilson. (Rec. pp. 57, 68, 69, 70, 72.) The money which he transferred did not constitute all of his property. (Rec. p. 56.) He still had an interest in real property situated in Piedmont, California. (Rec. p. 75.) The property was his residence and was held and had been held for a number of years in joint tenancy with his wife. It had been purchased with community funds and had a fair market value at the time of \$45,000.00. (Rec. pp. 75, 76.) He still retained a drawing account of \$12,000.00 a year in the firm of Wilson Bros. & Co., a co-partnership, of which he had been a member and for which he still acted in an advisory capacity. (Rec. pp. 62, 74). His total indebtedness at the time of the transfer, including taxes, recovery of which is sought in this suit, and other taxes, did not exceed \$20,160.70. At the time of the transfer, Henry Wilson was contesting the deficiencies as asserted by the Commissioner of Internal Revenue for the years 1918 and 1919 as well as deficiencies asserted for the years 1921-1924. (Rec. p. 74.)

At the close of the trial, Plaintiff's counsel moved for leave to amend the bill by adding an allegation as follows:

“That prior to the transfer of the money, the transfer of which has been alleged in the complaint, that it was understood and agreed with the decedent Henry Wilson that his debts should be paid out of the money so transferred.”

Defendants objected to the proposed amendment. No ruling was made by the Court below, either granting or denying the motion for leave to amend. (Rec. p. 77.)

In the Court below it was conceded by Plaintiff that there is no right to a creditors bill of the kind here involved where a debtor transfers only part of his property but retains sufficient to pay his debts unless the evidence shows an actual intent to defraud or hinder his creditors. There was no charge of actual fraud in the bill as filed nor any fact alleged therein which would support such a charge, and there was no evidence introduced tending to support such a claim. A general averment of fraud, of course, falls far short of any charge of actual fraud.

Adams v. Nagle, 82 Law. Ed., U. S. Sup. Ct.

Opinions 688, 693 (Decided March 28, 1938).

In the last analysis the single question presented was whether at the time of the transfer the transferor was insolvent or the effect of it was to make him insolvent. Upon this issue the Court below found (contrary to the undisputed evidence in this reference and contrary to law, as Appellants contend) that the

sum total of the debts of Henry Wilson at the time of the transfer exceeded the fair market value of his interest as joint tenant in the real property, and as a conclusion of law that the transfer made by him to Defendants was fraudulent as to his creditors, and because he was rendered insolvent by the transfer that the United States is entitled to recover from Defendants the amount of Henry Wilson's unpaid taxes for the years 1918 and 1919. Reduced to its simplest terms, the appeal turns on the point that not only was there no evidence whatever to sustain the finding that the transfer left Henry Wilson without property of sufficient value to pay his debts, but on the contrary the evidence shows, without contradiction, that the property he retained was more than sufficient to pay his debts, and therefore, the findings of fact to the contrary (and the decree which followed), constitute error requiring reversal.

**SPECIFICATION OF ASSIGNED ERRORS TO BE
RELIED UPON.**

Assignments of Error, Numbers 1, 2, 3, 7, 8, 11, 12, 13, 14, 15, 16, 18, 19 and 20. (Rec. pp. 79-85.)

ARGUMENT.

The Appellants contend:

1. That there was no evidence whatever to support the finding that the fair market value of the interest of Henry Wilson in the Piedmont property did not

equal one half of the fair market value of the residence, and that the sum total of the debts of Henry Wilson at the time of the transfer exceeded the fair market value of his interest as joint tenant in the property.

2. That the evidence without contradiction shows that after the transfer, Henry Wilson retained an interest in property located in Piedmont, California, which had been acquired with community funds, the same being held in joint tenancy by Henry Wilson and his wife. The fair market value of his interest was considerably in excess of the aggregate of Henry Wilson's debts at the time and Henry Wilson likewise, following the transfer, had a drawing account of \$12,000.00 a year in the firm of Wilson Bros. & Co., a co-partnership, and was, therefore, neither insolvent at the time nor rendered insolvent by the transfer.

3. That the burden of proof is on the Plaintiff and (erroneous findings aside) there is no evidence whatsoever to sustain a decree in favor of Appellee and against Appellants.

THERE WAS NO EVIDENCE WHATSOEVER TO SUPPORT THE FINDING THAT HENRY WILSON WAS RENDERED INSOLVENT BY THE TRANSFER, BUT ON THE CONTRARY, THE UNDISPUTED EVIDENCE SHOWS THAT IT LEFT HIM WITH PROPERTY OF A VALUE AMPLE FOR THE PAYMENT OF ALL OF HIS DEBTS.

Assignment of Errors Relied Upon.

7. The Court erred in failing to find that at the time of the transfer Henry Wilson did not know that

death was imminent and was expected to live for a considerable period thereafter, and the reason that he gave for making the transfer was because half of the money belonged to the Defendant, Mary H. Wilson, as community property, and she had started out without anything and had worked hard and saved for many years, and it was her money, and as to the balance he wanted to give it to the Defendants, Mary H. Wilson, Francis A. Wilson and Winfred T. Wilson; on the ground that it was material to the issues of this suit and fully supported by the evidence, with no evidence to the contrary.

12. The Court erred in failing to find that following the transfer of the bank account transferred by Henry Wilson on June 1, 1928, Henry Wilson still had and owned an interest in certain real property located in Piedmont, California, occupied as a residence by himself and wife, which had been acquired with community funds by deed on the 3rd day of October, 1922, which vested title thereto in the Defendant, Mary H. Wilson and the said Henry Wilson, as joint tenants with the right of survivorship, on the ground that the said facts are material to the issues of the case and sustained by the evidence, and with no evidence to the contrary.

13. The Court erred in failing to find that up to the date of the death of the said Henry Wilson, the said Henry Wilson had a drawing account and was drawing a salary of \$12,000.00 per annum from Wilson Bros. & Co., a corporation, for which he acted in an advisory capacity, upon the ground that the said facts

are material to the issues of this case and are fully supported by the evidence, and with no evidence to the contrary.

14. The Court erred in finding as set forth in Finding No. IV that the fair market value of the interest of one of the joint tenants did not equal one-half of the fair market value of the residence, on the ground that there is no evidence whatsoever to support the same.

15. The Court erred in finding as set forth in Finding No. IV that the sum total of the debts of said Henry Wilson at the time of his transfer of said bank account exceeded the fair market value of his interest as joint tenant in said residence, on the ground that there is no evidence whatsoever to support the said finding, and the said Finding is contrary to the undisputed evidence which shows that irrespective of whether all or only an undivided half interest in said residence was subject to the debts of the said Henry Wilson at the time of the transfer, the sum total of the debts of the said Henry Wilson was considerably less than the fair market value of his interest in said property.

16. The Court erred in failing to find that the sum total of the debts of the said Henry Wilson at the time of his transfer of said bank account was \$20,160.76, on the ground that the said facts are material to the issues of this case and fully supported by the evidence, and with no evidence to the contrary.

The Court found that at the time of the transfer Henry Wilson, in addition to the taxes in suit, owed \$361.25 in miscellaneous debts and income taxes for the years 1921-1924 in the sum of \$13,101.01. The Court also found "The expenses of his funeral and interment amounted to \$4,042.15." The Court did *not* find that this sum was a *debt* of Henry Wilson at the time of the transfer, as obviously a man could not be indebted for the expenses of his funeral and interment while he was still alive. The findings, then, show a total indebtedness of Henry Wilson at the date of the transfer as follows:

Deficiency in taxes for year 1918	\$4,006.61
Interest (as of Nov. 6, 1928)	775.74
Deficiency in taxes for year 1919	1,725.39
Interest (as of Nov. 6, 1928)	334.06
Miscellaneous Debts	361.25
Deficiency in taxes for years 1921-1924	13,101.01
	<hr/>
Total	\$20,304.06

Of course, at the date of the transfer Henry Wilson owed interest on the 1918-1919 taxes only to that date, so that interest as computed in the foregoing tabulation exceeds the actual amount of interest due at the date of the transfer by \$143.30 which results in a figure of \$20,160.76 as his total indebtedness on June 1, 1928.

Having found that following the transfer Henry Wilson still retained his interest in his Piedmont home held by him in joint tenancy with his wife and

of the fair market value in its entirety of \$45,000.00, the Court further found that "The fair market value of the interest of one of the joint tenants did not equal one-half of the fair market value of the residence" and "The sum total of the debts of said Henry Wilson at the time of his transfer of said bank account exceeded the fair market value of his interest as joint tenant in said residence", although there is not one word of testimony in the record to support the finding.

Were we to assume the truth of the statement that the fair market value of a half interest in the property was not equal to one-half of the fair market value of the whole and further assume that the Court may judicially notice the assumed fact, Appellee would still fall short of having met the burden, which, as will be shown, rests upon it of establishing insolvency. This is true because there is no finding—and no evidence—as to how much less the value of the interest of one of the joint tenants is than one-half of the fair market value of the whole. On the other hand, if the only natural inference is drawn that the interest of one of the joint tenants had a fair market value of one-half of the fair market value of the whole, the situation was that Henry Wilson retained property after the transfer of the fair market value of \$22,500.00 with debts aggregating only \$20,160.76, and so was completely solvent even without taking into consideration the drawing account of \$12,000.00 a year which he still had with Wilson Bros. & Co.

But under the law of California, all of the property, not merely one-half of it, was liable for Henry Wilson's debts. Of course the decisions of the California court of last resort establishing a state rule of property are binding in this proceeding.

Tyler v. U. S., 281 U. S. 496;

Warburton v. White, 176 U. S. 484.

In California, contrary to the general rule, where property is held in joint tenancy by a husband and wife, it is not what is known as a tenancy by the entirety.

Swan v. Walden, 176 Cal. 195;

Delanoy v. Delanoy, 216 Cal. 23.

Ordinarily, where community property has been taken in joint tenancy by husband and wife, *as between themselves*, even though it be community property, each has a half interest.

In re Kessler, 217 Cal. 32;

Siberell v. Siberell, 214 Cal. 767;

Delanoy v. Delanoy, 216 Cal. 23.

But while this may be the rule as between themselves, *as against creditors*, where the property taken in joint tenancy by husband and wife is *community property*, the whole of it, not a half, is liable for the husband's debts.

Hulse v. Lawson, 212 Cal. 614.

In the case of *Siberell v. Siberell*, supra, in which it was held that as between husband and wife themselves, a community and joint tenancy cannot exist at the same time in the same property, the Court was

at pains to point out (page 772) that this was not the case as against creditors, saying:

“It should be noted here that we are dealing strictly with the situation as between the parties to the marriage and are not dealing with the characteristics of the property as against the claims of judgment creditors or other third persons as was the case of *Hulse v. Lawson*, 212 Cal. 614. (299 Pac. 525.)”

The evidence in this case shows that the real property retained by Henry Wilson was community property. It was so designated in the documents offered in evidence by Plaintiff and to the same effect was the testimony of F. A. Wilson. (Rec. pp. 49, 75.)

Under the State law, therefore, the whole of this property was subject to the payment of Henry Wilson's debts; but even if, as seems to be the theory of the findings, only half of it was, Henry Wilson still was left with property more than sufficient at a fair valuation to pay all of his debts, and this too, without reference to the drawing account of \$12,000.00 a year which he had for acting in an advisory capacity for Wilson Bros. & Co.

THE BURDEN OF PROOF IS ON THE PLAINTIFF AND, ERRONEOUS FINDINGS ASIDE, THERE IS NO EVIDENCE WHATSOEVER TO SUSTAIN A DECREE IN FAVOR OF APPELLEE AND AGAINST APPELLANTS.

Assignments of Error Relied Upon.

18. The Court erred in its Conclusion of Law that the transfer of the bank account of the said

Henry Wilson in the San Francisco Bank amounting to \$430,737.73, was fraudulent as to his creditors and that Henry Wilson was rendered insolvent by said transfer, on the ground that neither the facts found nor the evidence sustains the same, the same is contrary to the evidence, and there is no evidence whatsoever to sustain the same.

19. The Court erred in its Conclusion of Law that the money so received by each of the Defendants, Mary H., Francis A. and Winfred T. Wilson was received by each of them impressed with a trust for the benefit of creditors of the deceased Henry Wilson and the money so received by each of them constituted a trust fund for the payment of income taxes due and owing to the United States by the said Henry Wilson for the years 1918 and 1919 in the following amounts:

For 1918\$4,782.35 and

For 1919 2,059.45

with interest thereon as allowed by law, on the ground that neither the facts found nor the evidence sustains the same, the same is contrary to the evidence, and there is no evidence whatsoever to sustain the same.

20. The Court erred in its Conclusion of Law that each of the Defendants is accountable to this Court for said trust fund so received by each of them for the payment of the claims in suit; on the ground that neither the facts found nor the evidence sustains the same, the same is contrary to the evidence, and there is no evidence whatsoever to sustain the same.

It must be kept in mind that the burden in this case was on the Appellee.

Commissioner v. Keller, 59 Fed. (2d) 499.

Moreover, if the transferor was not insolvent at the time of the transfer, the fact that he became insolvent subsequently is immaterial, and the transferees would not thereby become liable.

Commissioner v. Keller, 59 Fed. (2d) 499;

McDonald v. Williams, 174 U. S. 397.

It is a necessary item of proof in this proceeding and a matter which must be proved by the Plaintiff, either that the taxpayer was insolvent at the time of the transfer or that the transfer made the taxpayer insolvent.

Commissioner v. Keller, 59 Fed. (2d) 499;

In re Butler, 24 BTA 536;

In re Baker, 30 BTA 188.

Whether vesting of title in the survivor of the property held in joint tenancy at the death of Henry Wilson in any sense constituted a transfer, and if it did, what the effect of it was, we need not inquire. It is not involved in this suit, and even if it were, it would not make the transfer of the money in bank vulnerable to attack in this suit.

U. S. v. Nathanson, 1932 CCH 9432, U. S. D. C.

Northern Division of Ill.

It is clear, then, that in the face of the undisputed facts, Appellee had no right of recovery against these Appellants in this suit because

(1) Appellee could recover against these Appellants only if the transfer of the bank account left Henry Wilson insolvent, and

(2) The transfer of the bank account did not leave Henry Wilson insolvent.

It is submitted, therefore, that the decree ought to be reversed.

Dated, San Francisco,
August 17, 1938.

JOSEPH C. MEYERSTEIN,
Attorney for Appellants.